LIAN KIAN BOON

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, MUAR
RICHARD TALALLA JC
[CRIMINAL APPEAL NO. 41-18 OF 1989]
7 MAY 1990

CRIMINAL PROCEDURE: *Original charge of murder - Amended charge of voluntarily causing hurt - Plea of guilty - Mitigation - Matters which prosecution officer is limited to state in reply to mitigation - Desirability of probation report.*

The appellant was charged under s. 324 of the Penal Code (the Code) with the offence of voluntarily causing hurt to one L; the appellant pleaded guilty and made a plea in mitigation and was sentenced to 12 months imprisonment. The appellant appeals against sentence.

Held:

[1] It was not proper for the prosecuting officer in reply to the plea in mitigation to advise the Court of matters which had nothing to do with the charge in respect of which the appellant pleaded guilty; the appellant did not admit to these matters being true nor did he appear to have been given an opportunity to answer thereto.

[2] There was no basis for the Magistrate not requiring a probation report on the appellant. Case law repeatedly states that in the case of a person of young age who is liable to be sentenced to a term of imprisonment it is always desirable that a probation report on him be obtained.

[3] Taking into account the seriousness of the offence, the sentence of 12 months is not manifestly excessive. However taking into account the good behaviour of the accused the sentence is set aside and a bond entered into under s. 294 of the Code.

Cases referred to:
New Tuck Shen v. PP [1982] 1 MLJ 27
Rex v. Campbell [1911] 6 Cr App Rep 131
Rex v. Burton [1941] 28 Cr App Rep 89
R v. Van Pelz [1943] 1 All ER 36
Tukiran bin Taib v. PP [1955] 21 MLJ 24
Teh Yew Whatt v. PP [1958] 24 MLJ 171
Tan Kah Eng v. PP [1965] 2 MLJ 272
Lim Yoon Fah v. PP [1971] 1 MLJ 37

Legislation referred to:
Criminal Procedure Code, s. 294
Penal Code, ss. 173(b), 173(m)(2), 176(ii)(r), 324

For the appellant - Pang Hok Liong; M/s. C.C. Aiyathurai & Co.
For the respondent - Tan Poh Lai

JUDGMENT

Richard Talalla JC:

The appellant was charged before the learned Magistrate Segamat with having on 2 September 1988 at about 11.45p.m. at Jalan Bayan, Taman Sentosa, Labis, in the District of Segamat, in the State of Johor, voluntarily caused hurt to one Lim Ah Joo by means of a knife, an instrument for stabbing, which was likely to cause death, punishable under s. 324 of the Penal Code which section provides for sentence of imprisonment which may extend to 3 years or whipping or both.

The appellant pleaded guilty to the charge.

The prosecuting officer produced a statement of the facts of the case which is translated by me as follows:

> On 2 September 1988 at about 11.50p.m., the complainant, Constable 98211 Ahmad bin Embi who was attached to the Enquiry Office was informed by a member of the public that there was a fight at Taman Sentosa, Labis. The complainant made a first report as stated in Labis Report 1860/88.
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> Police investigation revealed that on 2 September 1988 at about 11.45 p.m., Lim Ah Joo together with 3 of his friends came out from Elegance Restaurant, No. 89, Taman Sentosa, Labis. Lian Kian Boon I/C. A 1575172 together with 4 of his friends followed them. A fight took place when Lim Ah Joo ran away. When they reached Jalan Bayan, Taman Sentosa, Lian Kian Boon who was chasing, stabbed Lim Ah Joo on his back and his face with a knife. Lim Ah Joo received treatment at the Segamat District Hospital.
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> The result of the investigation revealed that Lian Kian Boon had intended to cause injury on Lim Ah Joo with the use of a knife which can cause death.
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> Lian Kian Boon was charged under s. 324 of the Penal Code and pleaded guilty of the charge.

These facts were admitted as being true.

Counsel for the appellant then made a plea in mitigation which I translate as follows:

> At the time of the incident the accused was 18 years old. He went to school reaching Form 1 - and worked in Singapore as a mosaic trainee - after that the accused was yet to obtain employment. His family - his parents worked as 'hawkers'. There are 8 brothers and sisters - and 2 younger members are still schooling. In the fight the accused was punched a few times by the complainant, and this is the first time the accused was charged in Court. After the incident the accused surrendered to the police - he was not arrested by the police.
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> After that the accused became remorseful or after that incident - I appeal to the Court to permit the accused another chance. Appeal to the Court to pass a 'non-custodial' sentence - accused only 18 years old.

The prosecuting officer then replied and I translate as follows:

> Accused is charged under s. 324 - police investigation revealed that the accused was involved in secret society - and in this incident also had caused the death of Lim Ah Joo's friend which was as a result of a gang fight.
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> Notwithstanding that the accused had no previous conviction - I appeal to the Court to pass a sentence to demonstrate that this is quite a serious incident and so that the accused would realise the same.

The learned Magistrate then found the appellant guilty, convicted him and sentenced him to 12 months' imprisonment from the date of conviction.

The appellant now appeals against sentence.

In his grounds of judgment the learned Magistrate stated that the appellant was charged with 3 others then at large with the murder of one Chin Kuan Yew on 2 September 1988 at about 11.45 at night at Jalan Bayan aforesaid. The learned Magistrate then referred to an amended charge which is in fact the charge, the subject matter of this appeal. He referred to the injuries of Lim Ah Joo which by reference to the medical report he found to be serious. The medical report which was produced by the prosecuting officer spoke to assault by a sharp object resulting in 5 lacerated wounds of which 2 were to the face and 3 to the upper back. There was a 3 cm edge shape wound to the right cheek and a 1 cm laceration to the right chin. The 3 wounds to the back were 2 cm each sharp edge with 2 to 4 cm. depth. There was no surgical emphysema, no injury to the pneumothorax and no loss of consciousness. The patient was admitted and discharged well, on the same day which was 3 September 1988.

Next the learned Magistrate said that the actions of the appellant and his friends who were then still free were the actions of persons who did not have respect for the law of this country because they were not afraid to act, as they did in this case, at a public place namely outside a restaurant, that there was a preconceived plan showing intention on behalf of the appellant and his friends to cause injury to the complainant. This said the learned Magistrate was evidenced by the fact that notwithstanding that the complainant ran away the appellant chased and stabbed him.

The learned Magistrate then referred to Counsel's plea that it was the complainant who assaulted the appellant and that he the appellant acted reasonably in self defence. To this the learned Magistrate declared that it was clear from the facts as admitted by the appellant that it was the appellant who started the fight.

The next point the learned Magistrate referred to was, so he said, the evidence on the part of the prosecuting officer himself, that the fight was one between secret society members which showed how serious the matter was and in respect of which the Court had to take a serious view, in the public interest. The learned Magistrate then said that it was known that the area in which the incident happened was one where there was much secret society activity and that if the Court did not give weighty consideration it would be failing in its duty to administer justice.

Lastly the learned Magistrate said that although the appellant was below 21 years of age there was no need for a probation report because such was not compulsory, that such a report was only necessary in certain situations and that in this case because the offence committed involved a death even though the appellant was not involved in the incident, the Court was of the view that a weighty and appropriate sentence, to the offence committed should be imposed.

It is provided in s. 173(b) of the Code that if the accused pleads guilty to a charge whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon; provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him. In the same section, see subsection (m)(2), it is stated *inter alia* that if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law. Nowhere in the code can I find any provision for facts of

the case to be given by the prosecution as was done by the prosecuting officer in this case. However I do understand that it is the practice to do so. See *New Tuck Shen v. PP* [1982] 1 MLJ 27 where Wan Yahya J spoke to it being accepted practice of our Court for the prosecution to outline the facts of the case on a plea of guilty to the charge. That being the practice it seems to me nonetheless that the facts stated should be limited to facts which the prosecution are able to prove and then only to facts necessary to establish the charge. These facts will be put by the Court to the accused who will be asked whether he admits them. It is only then that the Court will decide whether or not to accept the plea of guilt.

Upon the Court accepting the plea of guilt and convicting the accused, the accused will be given an opportunity to be heard in mitigation of sentence. Once again there is no express provision in the code for such a plea except indirectly where by s. 176(2)(r) there is provision for the Court's note on a plea in mitigation to be kept as a record, including such a note on previous convictions and evidence of character.

A plea in mitigation having been made it is reasonable and I believe usual for the prosecution to reply, notwithstanding that yet again there is no provision in the code for such reply. This reply to my mind should be limited to matters raised in the plea in mitigating. In my view no controversial facts should be referred to in the reply or taken into consideration in the matter of sentencing. The only facts which can be considered, it seems to me, are facts relevant to the charge or which have been admitted by the accused.

In this regard there is the case of *Rex v. Campbell* [1911] 6 Cr App Rep 131. There the prisoner was convicted of obtaining money by false pretences and was sentenced to 3 years penal servitude. Counsel for the prisoner who had been refused leave to appeal against sentence, asked the Court of Criminal Appeal to give a ruling as to the propriety of the practice of police officers giving hearsay evidence after conviction, with a view to the increase of sentence. Alverstone CJ commented at 132:

> We have been asked to say something about the practice of police officers giving the Judge the result of their enquiries about prisoners. In ordinary circumstances we should not accede to such a request, but as the matter has recently been under the consideration of the Judges and the Home Office, we think it right to do so. For many years it has been known that after the conviction of a prisoner it is the duty of some responsible officer of police to tell the Court what he knows about the prisoner as the result of inquiry, where it would involve great difficulty and expense to prove the facts by legal evidence. .... At times, no doubt, police officers on these occasions say more than they ought to say against prisoners; ... It is important to consider what the action of the Court should be when it is suggested that some of the statements are not correct. If the prisoner wishes to deny anything, he can, especially if he is represented by Counsel, do so at the time. In this case he had every opportunity of doing so, and it does not appear that he now wishes to contradict the statements, but merely to urge some extenuating circumstances. If the prisoner challenges any statement it is the duty of the Judge to enquire into it; if necessary he should adjourn the matter, and if it is of sufficient importance he may require legal proof of it. Or he may ignore it, that if he does so he should state that he is not taking it into consideration. If the prisoner does not challenge the statements, the Court may take them into consideration, and no injustice is likely to be done. Very often it is in the prisoner's interest that his antecedents should be stated: if it is not so, that is not the fault of the police, but of the antecedents.

Then there is the case of *Rex v. Burton* [1941] 28 Cr App Rep 89. There a police officer employed by a railway company gave evidence to the effect that police inquiries had definitely proved that the prisoner was responsible for the losses which have taken place owing to stealing on the railway. Humphreys J commented on this evidence thus:

> That was a most improper statement to make. Either the police could prove that statement, in which case they ought to have prosecuted the appellant, or at least have given him an opportunity of asking for those offences to be taken into consideration, or they could not, in which case they ought not to have invited the presiding Judge to increase the appellant's sentence in respect of felonies with which he had never been charged, and therefore had never had an opportunity of disproving.

In *R v. Van Pelz* [1943] 1 All ER 36, the prisoner was committed for larceny and was sentenced to 15 months imprisonment. Before sentence was passed a police officer gave evidence. He stated the age of the accused and the main details of her life for some 10 or 12 years. He then went on to describe her in colourful terms as a prostitute, an associate of convicted thieves, an adventuress, a very dangerous woman indeed, completely unscrupulous and for many years past living entirely on her wits. Viscount Caldecote CJ delivering the judgment of the Court of Criminal Appeal had this to say at p. 38:

> The question which has exercised the minds of the Court is an important one. Police officers are always called, or nearly always called, after conviction, to assist the Court when it is considering the sentence to be passed on a convicted person.

The learned Judge went on to enlarge on what was said in the *Campbell and Burton* cases aforesaid saying:

> When a police officer is called to give evidence about a prisoner who has been convicted, he should in general limit himself to such matters as the previous convictions, if any, and antecedents of the prisoner, including anything that has been ascertained about his home and upbringing in cases where the age of the prisoner makes this information material. It is the duty of the police officer, we think, to inform the Court also of any matters, whether or not the subject of charges which are to be taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the Court. Police officers should inform the Court of anything in the prisoner's favour which is known to them, such as periods of employment and of good conduct. We have no reason to believe that this is contrary to the present practice of the police who constantly inform the Court of matters which are in the prisoner's favour. We also think that it is the duty of Counsel for the prosecution to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner.
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> It must not be taken that we are attempting to lay down a rule in such wide, and, at the same time, such exact, terms as would cover every case. That would be impossible, but it is hoped that these observations may be some guide to the right practice. The only other observation I need to make is this, and I hope it is unnecessary. Nothing I have said is intended to affect in the least degree that right of the Court to inquire into any matter on which the Court itself thinks it right to ask for information.

I have to say with respect that the learned Magistrate should have disregarded completely anything connected with the original charge against the accused. That charge was amended and it was to the amended charge that the appellant pleaded guilty. The original charge namely a charge of murder against the appellant must be taken to have been withdrawn and the appellant treated as being wholly innocent of that charge.

The view I take is that it was not proper for the prosecuting officer in reply to the plea in mitigation to tell the Court that the appellant was involved in secret societies and that the case involved the death of the complainant's friend which was a consequence of gang fight. These matters had nothing to do with the charge in respect of which the appellant pleaded guilty. What is more the appellant did not admit to these matters being true nor did he appear

to have been given an opportunity to answer thereto. These comments which were erroneously accepted as evidence on the part of the prosecuting officer, who did not give evidence, certainly had an effect on the mind of the Court in passing the sentence and indeed the learned Magistrate made reference to secret societies in his grounds of judgment and it is reasonable to infer that the judicial notice the learned Magistrate thought fit to take in respect of secret society operations in that area might well have been triggered by comments on that subject by the prosecuting officer.

There was no factual basis for the learned Magistrate to find, as he did, that the fight was started by the appellant or indeed how it started at all and what transpired during the fight. It is not known what part if at all the complainant took. It is not known for certain whether others were involved and if so how many and what they did. There was nothing from which it could be deduced that there was a preconceived plan to which the appellant was privy, to cause injury to the complainant.

I regret I could find no basis for the learned Magistrate not requiring a probation report on the appellant. At the time of the offence he was 18 years old. My perusal of the case law shows that it has been repeatedly stated that in the case of a person of young age who is liable to be sentenced to a term of imprisonment it is always desirable that a probation report on him be obtained. This was said more than 35 years ago by Bellamy J in *Tukiran bin Taib v. PP* [1955] 21 MLJ 24, by Smith J in *Teh Yew Whatt v. PP* [1958] 24 MLJ 171, by Ambrose J in *Tan Kah Eng v. PP* [1965] 2 MLJ 272 and by Chang Min Tat J, as he then was, in *Lim Yoon Fah v. PP* [1971] 1 MLJ 37. I therefore asked for and obtained a probation report on the appellant.

A perusal of the National Registration Identity Card of the appellant which I called for disclosed that he was born on 26 May 1970. The probation report did not disclose anything adverse to the appellant.

Notwithstanding all this the admitted fact remains that the appellant chased and stabbed the complainant with a knife in a public place. The medical report on the latter discloses that the wounds inflicted were severe. In the circumstances I do not consider the sentence of 12 months imprisonment to be manifestly excessive. However it is not know whether in imposing sentence the learned Magistrate had in mind that the appellant was detained on 7 September 1988 when he surrendered to the police and remained in custody till 19 February 1989.

Accordingly I am of the view that in the ordinary course of events the period of his detention should have been taken into consideration and deducted from the sentence of 12 months. If the sentence is to run from today he would have to serve a term of about 1 month and 18 days, so his Counsel reckoned. He has behaved himself to date and there seems to be no purpose at this stage in sending him to prison. However I shall ensure that as far as possible he will not get into trouble again. I therefore order that the sentence of 1 year be set aside and there be substituted therefore a bond under s. 294 of the Criminal Procedure Code, in the sum of RM5,000 with 2 sureties for 2 years.

Also found at [1990] 2 CLJ 799